

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION AT COLUMBUS**

In re: OHIO EXECUTION  
PROTOCOL LITIGATION,

: Case No. 2:11-cv-1016

Chief Judge Edmund A. Sargus, Jr.  
Magistrate Judge Michael R. Merz

This Order relates to all Plaintiffs  
except Tibbetts, Otte, and Campbell

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**DECISION AND ORDER GRANTING IN PART AND DENYING IN  
PART DEFENDANTS' MOTION FOR A SCHEDULING ORDER**

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This case is before the Court on Motion of Defendants for a Scheduling Order (ECF No. 1047), Plaintiffs' Response (ECF No. 1058), Defendants' Reply (ECF No. 1063), and Plaintiffs' Sur-Reply (ECF No. 1084).

A draft of this order was circulated early on July 31, 2017, to the attorneys who have been participating in regular telephonic scheduling conferences in this case since October 3, 2016. Lead Plaintiffs' attorney Allen Bohnert made the point that not all Plaintiffs' counsel would have received the draft, but only those expected to participate in the conference. The Court notes that all counsel have been served with Defendants' Motion and there have been no filings in response except those noted above. Nonetheless, it is hereby ORDERED that any Plaintiff whose counsel did not participate in the status conference may file objections to the Order not later than noon on August 3, 2017.

Since Defendants' Motion was filed on May 23, 2017, the following events of significance to scheduling have occurred:

1. On June 26, 2017, the Sixth Circuit decided *Fears v. Morgan* (*In re: Ohio Execution Protocol*), 860 F.3d 881 (6<sup>th</sup> Cir. 2017)(en banc), which vacated this Court's preliminary injunction enjoining the executions of Ronald Phillips, Gary Otte, and Raymond Tibbetts. The Supreme Court denied certiorari, *Otte v. Morgan*, 2017 U.S. LEXIS 4327 (July 25, 2017), and Phillips was executed on July 26, 2017.
2. This Court has granted in part and denied in part Defendants' Motion to Dismiss the Fourth Amended Complaint of Plaintiffs Tibbetts and Otte, albeit without entering judgment (ECF No. 1088).
3. This Court has also dismissed Plaintiffs Tibbetts and Otte's Joint Supplemental Complaint raising their Forty-Ninth Cause of Action under the Ohio Corrupt Practices Act. Here the Court did enter judgment, on Plaintiffs' request and over Defendants' objections (ECF No. 1120).
4. The Sixth Circuit has, in a divided opinion, found Plaintiff Tibbetts' second-in-time habeas corpus petition to be second-or-successive and dismissed it. *In re: Raymond Tibbetts*, Case No. 17-3609, 2017 U.S. App. LEXIS 13664 (6<sup>th</sup> Cir. July 24, 2017). Both the majority and dissenting opinions have language which is relevant to the interpretation of *Adams v. Bradshaw*, 826 F.3d 306 (6<sup>th</sup> Cir. 2016) ("Adams III") and its application to this case and the habeas corpus proceedings most of the Plaintiffs have pending.

In light of these developments, the Court finds it appropriate to enter a scheduling order, albeit on dates which represent compromises between the dates proposed by the parties. It is hereby ORDERED:

1. Plaintiffs other than Tibbetts, Otte, and Campbell shall file their Fourth Amended Omnibus Complaint not later than September 1, 2017. With respect to each claim for relief pleaded therein, Plaintiffs shall indicate to which claims made in the Fourth Amended Complaints of Plaintiffs Tibbetts, Otte, and Campbell the particular claim is parallel. Plaintiffs shall file their amended individual supplemental complaints related to the October 7, 2016, execution protocol not later than October 1, 2017. (If Defendants have not provided the “supplemental medical and mental health records in Ohio’s possession” referred to at EFC No. 1058, PageID 40684 by September 25, 2017, the Court will consider an extension of time.)
2. As soon as they reasonably become available and in any event not later than 210 days before any Plaintiff’s scheduled execution, Defendants shall provide to that Plaintiff’s counsel any supplemental medical and mental health records of that Plaintiff not theretofore produced. Each such Plaintiff shall then file his motion to amend or supplement his individual complaint not later than thirty days after such records are produced.
3. Nothing herein shall be construed to contravene the holding of the Sixth Circuit in *Cooey v. Strickland*, 479 F.3d 412 (6<sup>th</sup> Cir. 2007), and *Cooey v. Strickland*, 588 F.3d 921 (6<sup>th</sup> Cir. 2009), that any claim based on changes in Ohio’s execution protocol will arise on the date those changes are made and that the two-year statute of limitations for claims under 42 U.S.C. § 1983 will run from that date.

4. Defendants shall file their answer to the Fourth Amended Omnibus Complaint not later than October 1, 2017. Answers to any other amended or supplemental complaints herein shall be filed within the time provided in Fed. R. Civ. P. 15(a)(3).
5. Any party may file a motion for summary judgment not later than November 1, 2017. Memoranda in opposition and reply memoranda in support shall be filed on the schedule set in S.D. Ohio Civ. R. 7.2.

July 31, 2017.

s/ *Michael R. Merz*  
United States Magistrate Judge